No. 17-193

In the
Supreme Court of the United States

JEFFERSON DUNN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Petitioner,
v.
VERNON MADISON,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF

STEVE MARSHALL
Alabama Attorney General

Andrew L. Brasher
Alabama Solicitor General
*Counsel of Record

OFFICE OF THE ALABAMA
ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
abrasher@ago.state.al.us

Counsel for Petitioner

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ARGUMENT

Madison's brief in opposition makes all the conventional arguments, except two. Madison does not dispute that the questions presented are important or that this case is a good vehicle to answer them. As explained in the petition, this case has been to the Court before, with four Justices voting to vacate the lower court's decision to stay Madison's execution. And the added benefit of granting cert here is that the Court can resolve a recurring issue about competency to be executed after a full and fair review, instead of being forced to address the issue on expedited review of an execution-day motion. Madison does not disagree with any of this.

As for the arguments in Madison's brief, they reflect a reading of the Eleventh Circuit's decision that cannot be reconciled with even a cursory review of the opinion itself. The Eleventh Circuit did not enjoin Madison's execution because of some unique fact relating to Madison's health or the experts in this case. It plainly did so because it adopted a bright-line rule about memory: "a finding that a man with no memory of what he did wrong has a rational understanding of why he is being put to death is patently unreasonable." App. 28a. That bright-line rule, which the Eleventh Circuit emphasizes throughout its opinion,[1] has

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[1] App. 20a ("Mr. Madison has no memory of his capital offense"); 20a ("the record includes no indication that Dr. Kirkland assessed whether Mr. Madison could remember the crime"); 21a ("Dr. Goff testified that Mr. Madison cannot remember the crime and doesn't believe he has killed anyone. Dr. Goff therefore concluded that Mr. Madison doesn't understand why he is going to be punished"); 24a ("Dr. Goff's testimony showed that Mr. Madison cannot remember his crime, doesn't believe he committed murder, and therefore cannot rationally connect his crime to his

never been adopted by this Court and cannot be applied under AEDPA. And that bright-line rule has been rejected by other courts, which have allowed states to execute prisoners who did not remember or otherwise acknowledge committing murder.

A. The lower courts are divided.

The lower courts are divided on whether an inmate can be executed if he does not remember or otherwise acknowledge committing murder. Madison argues that, what we characterize as a split, is really "a collection of various federal circuit court and state court decisions applying the same clearly established law to differing facts." BIO 31-32. That is a manifestly incorrect reading of these cases. Instead, as explained in the petition, the lower courts are reaching *opposite* results on the *same* facts because they disagree about the *Ford/Panetti* standard.

There is no cleaner split than the split between this case and the Sixth Circuit's decision in *Bedford v. Bobby*, 645 F.3d 372 (6th Cir. 2011). There, an expert opined that "[a]t the present time, [Bedford] has no actual memory of committing the offenses." *Bedford v. Bobby*, 2011 WL 1843281, at *6 (S.D. Ohio May 16, 2011). The inmate's "memory [wa]s severely impaired," he "lack[ed] intact memories of events," and his mental "condition has ... deteriorated ... with the onset of a dementia [-]form illness." *Bedford*, 645 F.3d at 378. Because of this dementia and associated lack of memory, Bedford's experts concluded that he was

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execution"); 26a-27a (the state "court never considered the impact of Mr. Madison's memory loss or his belief that he never killed anyone"); 27a ("Mr Madison cannot be deemed competent" because "he doesn't remember the crime and he believes, to the best of his ability, he has never killed anyone").

not competent to be executed. That is almost verbatim the same testimony that Madison's expert, Dr. Goff, offered here: "Dr. Goff testified that Mr. Madison cannot remember the crime and doesn't believe he has killed anyone. Dr. Goff therefore concluded that Mr. Madison doesn't understand why he is going to be punished or the act for which he is to be punished." App. 21a.

But the Eleventh Circuit and the Sixth Circuit held that this Court's caselaw compelled opposite results on the same facts. The Eleventh Circuit held that Madison's inability to remember his crime was dispositive: "Dr. Goff's testimony addressed the core question posed by *Panetti* . . . Mr Madison cannot be deemed competent" because "he doesn't remember the crime." App. 21a-22a, 27a. The Sixth Circuit held that the inmate's memory of the crime was irrelevant: "The Supreme Court has never held, much less suggested, that the failure to recall precise facts of an offense amounts to the kind of incompetence that prohibits the execution of a defendant." *Bedford*, 645 F.3d at 378-79.

Moreover, the Sixth Circuit held that the state court was *reasonable* for relying on the same kind of evidence that the Eleventh Circuit held that the state court *unreasonably* relied on in this case. The Sixth Circuit: "[a] state court could reasonably conclude" that the inmate had a rational understanding because he "could explain that if someone were 'on death row, they killed somebody'" and "suggested that different sentences may be handed down depending on the manner in which the victim was killed." *Id.* at 379. The Eleventh Circuit: the state court unreasonably relied on testimony "that Mr. Madison understands the procedural history of his case and is aware that he has

been sentenced to death" and can "distinguish between a death sentence and a life sentence." App. 22-23a.

Other courts have likewise held that an inmate had a rational understanding under *Ford/Panetti*, even though he could not remember committing a capital offense because of age or dementia. *See State ex rel. Clayton v. Griffith*, 457 S.W.3d 735, 750 (Mo. 2015) (although inmate has "several disorders," including "dementia," "traumatic brain injury," "a small stroke," and "possible age-related decline," he has a rational understanding under *Ford/Panetti* because he "understands that he is under the threat of execution, that this will result in his death"). The Court should resolve the split in this case instead of waiting to resolve it on an expedited motion for stay of execution in some later case.

B. The Eleventh Circuit's decision is wrong under AEDPA.

The Eleventh Circuit also flouted this Court's caselaw when it applied a new rule in a federal habeas proceeding governed by the Anti-terrorism and Effective Death Penalty Act ("AEDPA"). The Eleventh Circuit's bright-line rule—that an inmate "cannot be deemed competent" to be executed if "he doesn't remember the crime"—has most assuredly not been clearly established by this Court. App. 27a. Instead, the Court has intentionally declined to "attempt to set down a rule" that would govern competency determinations. *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007).

Madison does not defend the Eleventh Circuit's rule. Instead, he simply asserts, without analysis, that "the Eleventh Circuit applied *Ford* in precisely

the way this court ruled it should be applied in *Panetti*." BIO 24. But this Court in *Panetti* did not say that an inmate's failure to remember committing a crime means that he cannot be executed for the crime. And, as explained in the petition, a prisoner's memory and his "rational understanding" are obviously two different things. A history major can rationally understand the Vietnam War, even though he has no independent memory of it. Conversely, a Vietnam veteran may recall the war in vivid detail, but hold delusional beliefs about it. The Eleventh Circuit's bottom-line conclusion—that the state court was "patently unreasonable" to "find[] that a man with no memory of what he did wrong has a rational understanding of why he is being put to death"—lacks any support in law or logic. J.A. 28a.

For his part, Madison doubles down on the Eleventh Circuit's erroneous conflation of memory and "rational understanding." Throughout his brief, Madison contends that the mere fact he has been diagnosed with strokes and dementia-related amnesia means that he is necessarily incompetent to be executed. *See* BIO 11-15, 28 & n.12. But this diagnosis means only that Madison does not independently recall events from his past. *See* BIO 11 ("features of vascular dementia . . . include the onset of cognitive deficits, like memory loss") & 12 ("Madison's retrograde amnesia has meant that his episodic memory—memory related to events that happened to him in the past—has significantly declined"). *See also* App. 24a ("Mr. Madison cannot remember his crime, doesn't believe he committed murder"). Although we have no way of knowing if Madison has truly forgotten the crime he committed, no one disputes that Madison has experienced

decline over the years. But, because memory and rational understanding are not the same thing, Madison's memory problems do nothing to establish that he lacks a rational understanding of his death sentence. *See Bedford*, 645 F.3d at 378 ("even on their own terms," an inmate's amnesia claims "do not establish that [he] does not understand the reasons for his conviction or the nature of his punishment").

On the actual question of rational understanding, Madison's brief has nothing to say. For example, Madison does not dispute that he fails to meet the ABA's and APA's standards for incompetency to be executed, as we pointed out in the petition. Madison's own expert concluded that Madison "is able to understand the nature of the pending proceeding." Doc. 8-3, Tab R-14 at 8. He concluded that Madison "understands the sentence specifically the meaning of a death sentence." Doc. 8-3, Tab R-14 at 18. And he concluded that Madison understands that "the reason he was in prison was because of 'murder.'" Doc. 8-3, Tab R-14 at 7. Even Madison's responsibility-denying statement that he never "went around killing folks" demonstrates that he understands the crime for which he was convicted and the retributive nature of his sentence.

As explained in the petition, this case is on all fours with cases in which the Court has summarily reversed lower courts for granting habeas relief. Once again, Madison has no meaningful response. He argues that those cases involved "the lower court taking a legal rule from this Court's precedent and *extending* it to the factual scenario presented." BIO 29. In this case, Madison claims, the Eleventh Circuit merely "*applied* the legal rule from controlling Supreme Court precedent to . . . unique facts." BIO 29.

But our arguments are not about a factual distinction between this case and *Ford/Panetti*. The problem here is not that Madison suffers from a delusion that is different than the one at issue in *Panetti* or that his "DSM diagnosis differ[s]" from the diagnosis in *Ford*. BIO 29-30 & n. 13. Instead, it is undisputed that Madison is *not* insane. The issue here is one of law: Is a sane inmate incompetent to be executed if he does not remember or otherwise acknowledge committing murder? This Court has never answered that question, and the absence of clearly-established precedent is decisive under AEDPA.

C. Madison's brief relies on red herrings that do not support denying certiorari.

Lastly, there are four red herrings in Madison's brief that, although they warrant a clarifying response, are ultimately irrelevant to the question whether to grant the petition.

First, Madison begins his brief by recounting debunked assertions of psychosis and delusion from his trial 25 years ago. BIO 4-7. But it is undisputed at this point that Madison is not delusional or psychotic. Madison's own expert in this case testified that he agreed with the state court's expert that Madison is neither delusional nor psychotic:

> Q. Do you agree with [the court's expert], who testified that Mr. Madison is neither delusional or psychotic?
>
> A. I didn't see an indication of any of those conditions.

Doc. 8-1, Tab R-9 at 56 (testimony of Dr. Goff). The state court credited this testimony, expressly finding that Madison is not delusional. App. 83a. And Madison has never challenged that state-court finding at any point in this federal habeas proceeding. As the Eleventh Circuit explained, the "mental conditions relevant here" are "dementia and related memory loss," not psychosis or delusions. App. 25a.

Second, Madison says it is "critical[]" that he was sentenced to death by a judge at his third trial, instead of a jury. BIO 3-4. He ignores three things: (1) his first two trials ended with juries recommending a death sentence,[2] (2) Madison waived any objection to the judge's sentencing authority at his third trial,[3] and (3) this Court held in 1995 that judicial sentencing in capital cases is constitutional, *Harris v. Alabama*, 513 U.S. 504 (1995). In any event, whatever one thinks of judicial sentencing going forward, it is irrelevant to the question here: whether the state can carry out a death sentence that has been final since the 1990s because the inmate cannot remember committing murder. *See Brooks v. Alabama*, 136 S.Ct. 708 (Jan. 21, 2016) (Sotomayor, J., concurring in denial of petition for certiorari).

Third, Madison misleadingly suggests that he previously took responsibility for the murder because he "admit[ed] killing the victim in this case." BIO 6 & n.2. But, as explained in the cert petition, Madison

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[2] *See Madison v. State*, 545 So. 2d 94, 95 (Ala. Crim. App. 1987) (the jury's vote was 11-1); *Madison v. State*, 620 So. 2d 62, 63 (Ala. Crim. App. 1992) (10-2).

[3] *See Madison v. State*, 718 So. 2d 90, 104 (Ala. Crim. App. 1997) ("The record reveals that the appellant did not object to the trial court's override of the jury's advisory verdict.").

has never accepted responsibility for *murdering* Officer Schulte and has instead always concocted various theories of innocence. *See also* App. 37a (Jordan, J., dissenting) ("Dr. Goff was not aware that Mr. Madison had never admitted that he was guilty of murder"). For example, before his second trial in 1990, Madison was already telling psychologists that "he could not remember the shooting." *Madison v. State*, 620 So. 2d 62, 66 (Ala. Crim. App. 1992). His current amnesia claim is just the latest iteration of the responsibility-denying story he has always told.

Fourth, without explanation, Madison asserts that "[t]he three decades Vernon Madison has spent on death row are a direct result of the State of Alabama's misconduct and its insistence on defending the misconduct for years and in multiple courts." BIO 3. Of course, the truth is that Madison is on death row because, after a career of violent crime, he murdered a police officer so that he could attack a woman the officer was protecting. Madison also ignores that it was the *state* courts that reversed his first two convictions, in a good faith effort to protect his constitutional and procedural rights.[4] In any event, Madison's third conviction and sentence have been final since the 1990s, *Madison v. Alabama*, 525 U.S. 1006 (1998), and have been affirmed by the federal courts in federal habeas, *Madison v. Thomas*, 135 S. Ct. 1562 (2015). It is hard to see the "misconduct" in securing or defending a valid conviction and sentence.

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[4] We would also note that the career prosecutor who Madison accuses of misconduct is now the chief prosecutor of the U.S. Attorney's Office for the Southern District of Alabama and has been for over a decade. *See Madison v. Allen*, 2013 WL 1776073, at *6 (S.D. Ala. Apr. 25, 2013).

The Court should grant certiorari to resolve the split about competency to be executed. In the alternative, it should summarily reverse because the Eleventh Circuit erroneously applied a new rule in a federal habeas case. *See Virginia v. LeBlanc*, 137 S.Ct. 1726 (2017) (recognizing that "[t]hese arguments cannot be resolved on federal habeas review" but that, by reversing, "the Court 'express[es] no view on the merits of the underlying" claim'").

Respectfully submitted,

STEVE MARSHALL
Attorney General

Andrew L. Brasher
Solicitor General
*Counsel of Record

OFFICE OF THE ALABAMA
ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
abrasher@ago.state.al.us

Counsel for Petitioner

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